SUPREME COURT, U.S.
FILED

No. _____

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In The

Supreme Court of the United States

SEMINOLE ENTERTAINMENT, INC.,
d/b/a, RACHEL'S GENTLEMEN'S CLUB,

Petitioner,

vs.

CITY OF CASSELBERRY, FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The Florida Fifth District Court Of Appeal

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The licensing regulations in Casselberry's adult entertainment code allow for the suspension of an adult entertainment license without requiring proof of culpable conduct on the part of the business's owner; as such, are these provisions violative of the First and Fourteenth Amendments?

PARTIES TO THE PROCEEDING

The parties listed in the caption are the only parties to the proceeding, specifically the City of Casselberry and Seminole Entertainment, Inc.

CORPORATE DISCLOSURE STATEMENT

Seminole Entertainment, Inc. has no parent corporation nor does any publicly held company own stock therein.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully requests this Court to issue a writ of certiorari to review the decision of the Florida Fifth District Court of Appeal entered in this case. **App. A.**

OPINIONS BELOW

The decision of the Florida Fifth District Court of Appeal is unpublished. **App. A.** The order of the trial court was not reported and is included herein. **App. B.** Rachel's Motion for Written Opinion and Motion for Rehearing En Banc was denied. **App. C.**

STATEMENT OF JURISDICTION

The decision of the Court of Appeal was entered on September 5, 2006. Rehearing was denied by the appellate court on November 14, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case implicates both the First and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Procedure and Facts

The (judicial) process is marginalized when one considers the political and unfair forces brought to bear against the petitioner.

Rachel's has been a licensed adult entertainment establishment in Casselberry, Florida for approximately fifteen years, offering female dance entertainment for the enjoyment of its patrons. The city wished to rid itself of Rachel's and close the nightclub. The mayor ran (for re-election) on a platform that adult entertainment should be eliminated from the city. He won.

An undercover police investigation was launched against Rachel's. One of the Casselberry commissioners acted as a police operative – wearing a "wire" in the hopes that one of Rachel's owners would be arrested. Ultimately dancers, patrons, and workers at Rachel's were arrested for offenses ranging from exposure to narcotics. The oddity of this case is heightened by the fact that one of the main undercover police agents had a "love" interest in one of the Rachel's dancers and carried on a secret affair with her.

After the arrests, Casselberry brought an administrative case against Rachel's, the purpose being to revoke the nightclub's license for two years. The city's code allows it to revoke an adult entertainment license under a theory of respondeat superior – simply meaning that if arrests occurred at the business, the city was *not* required to show that the owner had any knowledge of, involvement in, or culpable responsibility for such conduct. Stated differently, arrests are automatically imputed to ownership and the license is revoked. See Section 14-92, Casselberry Code, **App. E**.

The jury convened to hear the case consisted of the mayor and his fellow city commissioners. The mayor took on a dual role acting as both judge and fact-finder. See *Seminole Entertainment, Inc. v. City of Casselberry*, 811 So.2d 693 (Fla. 5th DCA 2001). Rachel's attempted to defend itself but the mayor overruled virtually all of Rachel's objections. The city commissioner who wore the "wire" assisted the prosecution in questioning witnesses (from the dias). This commissioner, like the mayor, participated in the entire "trial," but after the case was concluded, he recused himself from deliberations. Rachel's attempted to question the city's principal witness regarding the case agent (who had the sexual liaison with the Rachel's dancer) but the mayor prevented cross examination. The mayor and his fellow commissioners voted unanimously to revoke Rachel's license for two years.[1]

Rachel's filed two lawsuits. One addressed the administrative trial and license revocation (state petition for writ of certiorari), and the second sought to declare Casselberry's code unconstitutional (declaratory judgement and injunctive relief).

Judge after judge in the local community refused to hear the case, disqualifying themselves on their own motions – some without explanation. "Although several judges have voluntarily recused from this case for reasons best known to them, no judge has recused upon motion of a party." *Seminole Entertainment, Inc. v. City of Casselberry*,

[1] Since that time the city has amended its "adult" code providing that if an adult business has previously had its license revoked (obviously referring to Rachel's as Rachel's is the only "adult" business located in Casselberry), a second revocation can be enhanced to four years.

9 Fla.L.Weekly Supp. 704a (Fla. 18th Jud. Cir. 2002). Unable to find a judge, Rachel's filed a petition for writ of mandamus with the appellate court seeking the appointment of an unbiased judge. *Seminole Entertainment, Inc. v. City of Casselberry*, 788 So 2d 1135 (Fla. 5th DCA 2001).

When Rachel's succeeded in obtaining a judge to hear the case, the city moved to disqualify him asserting bias. Although the judge was concerned over the maneuvering employed by the city, he disqualified himself to avoid the appearance of impropriety. *Seminole Entertainment, Inc. v. City of Casselberry*, 9 Fla.L.Weekly Supp. 704a (Fla. 18th Jud. Cir. 2002).

Ultimately, Judge Debra S. Nelson was assigned to both cases. She denied Rachel's request for a temporary injunction, and an appeal was taken. In an unanimous opinion the appellate court found that the city's revocation proceedings were fundamentally unfair and the city commission was biased against Rachel's.

> In this case, Rachel's has established more than mere political bias or an unfriendly political atmosphere. In effect, it was denied the right to challenge, through cross examination, the testimony of the principal witness against it. The evidentiary rulings by Mayor Pronovost were not merely erroneous but rather reflect **a bias so pervasive as to have rendered the proceedings violative of the basic fairness component of due process.**[2]

Seminole Entertainment, Inc. v. City of Casselberry, 811 So.2d 693, 696-697 (Fla. 5th DCA 2001).

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[2] All emphasis in this brief has been added unless otherwise noted.

The court also found that key-management personnel at Rachel's may not have had any knowledge of the wrongdoings at the nightclub. The case was remanded for the entry of a temporary injunction. Judge Nelson refused to enter the injunction and instead decided to hold another hearing on Rachel's motion; a hearing she termed "de novo." (R5/1058-1059). Relief was once again sought with the appellate court and Judge Nelson was ordered to enter the injunction. "We grant the motion and direct the trial court to enter the temporary injunction sought by the appellant . . . " *Seminole Entertainment, Inc. v. City of Casselberry*, 2001 Fla.App. LEXIS 18239 (Fla. 5th DCA 2001).

In the meantime, Judge Nelson denied Rachel's petition for writ of certiorari. Rachel's appealed. While the injunction was in place, a different panel of appellate judges were assigned to the certiorari appeal. In a strange twist the second panel found that it would not reach the merits of Rachel's case because the case did not meet the procedural prerequisites for "second-tier" certiorari review. Accordingly, Rachel's was denied relief – despite the opinion in 811 So.2d 693 (later to become recognized as "Rachel's I"). See *Seminole Entertainment, Inc. v. City of Casselberry*, 813 So.2d 186 (Fla. 5th DCA 2002).

Judge Cobb, who sat on both "Rachel's" panels, dissented in "Rachel's II" finding that the nightclub was deprived of fundamental due process.

> A quasi-judicial proceeding contemplates a certain level of basic fairness in order to comply with the requirements of due process. (Citation omitted). As I read the transcript of the proceeding before the city commission in this case, **that basic fairness was denied.**

* * * *

> Rachel's is entitled to a new hearing, one which comports with elementary notions of due process.

Seminole Entertainment, Inc. v. City of Casselberry, 813 So.2d 186, 193 (Fla. 5th DCA 2002).

The effect of the second panel's opinion was to lift the injunction entered in the first panel's opinion (811 So.2d 693 – "Rachel's I"). Rachel's appealed the second panel's ruling to the Florida Supreme Court which denied review. Justices Shaw and Lewis dissented. *Seminole Entertainment, Inc. v. City of Casselberry*, 835 So.2d 269 (Fla. 2002). This Court also denied review. *Seminole Entertainment, Inc. v. City of Casselberry*, 539 U.S. 915 (2003).

Because a final judgement had not been entered in the declaratory judgment action (this case), Rachel's continued to litigate it to finality. Judge Nelson granted the city relief finding that "Rachel's II" (813 So.2d 186) barred Rachel's case under the *"res judicata"* doctrine. Rachel's appealed. The appellate court reversed (in part) finding that several of Rachel's constitutional claims were procedurally alive. *Seminole Entertainment, Inc. v. City of Casselberry*, 866 So.2d 1242 (Fla. 5th DCA 2004).

On remand, Rachel's sought to amend its lawsuit to bring its claims expressly under the United States Constitution and 42 U.S.C. Section 1983. Judge Nelson granted leave to amend. The thrust of Rachel's argument was that Casselberry's Code, Sections 14-92 and 14-93, violated the First and Fourteenth Amendments because those provisions allowed the city to hold the club's owners culpably responsible for criminal acts which occurred at the establishment absent the owner's knowledge. See **App. G**.

However, in ruling upon summary judgment, Judge Nelson found that even though she granted Rachel's leave to amend, Rachel's was not entitled to amend its lawsuit because the "Rachel's II" opinion (813 So.2d 186) constituted "law of the case." The court also found that Sections 14-92 and 14-93 did not violate the United States Constitution.

> The plaintiff's final claim is that this is a strict liability code and therefore invalid. Based upon the definitions set forth in the code, any violation of the law on the premises of Rachel's automatically imputes knowledge to the owner. As such, the license is subject to revocation on a theory or respondiat [sic] superior.
>
> * * * *
>
> Finally, as to the underlying claim, that the definitions of "licensee" and "operator" are so broad as to subject the license to revocation on a theory of respondiat [sic] superior. **This court acknowledges that there would be very few scenarios of employee crime which would not attribute knowledge to ownership.** However, the code in question does not restrict protected expression; it prohibits criminal activity and carries only an incidental burden on the plaintiff's nude dancing. See *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986).

App. B.[3]

[3] The lower court's citation to *Arcara* widely misses the mark. There, this Court did not address the process or procedures which must be employed in revoking a license; nor did this Court specifically

(Continued on following page)

Rachel's appealed and oral argument was held before the state appellate court on July 12, 2006. At that time, Chief Judge Robert Pleuss stated that he thought that Casselberry's Code, which operates under a respondeat superior theory of liability, violated *United States v. O'Brien*, 391 U.S. 367 (1968).

> I have a real difficult time trying to figure out how you can square the existing ordinance and what he's attacking in that ordinance with *O'Brien*.

Oral Argument Video at counter 29:16 through 29:23.[4]

* * * *

> It's the fourth prong that I'm trying to get you to. [Speaking to Casselberry's lawyer].

Oral Argument Video at counter 31:42 through 31:43.

On the other hand, Judge Jacqueline Griffin stated the case may be procedurally barred because only the appellate court has the right to allow a party to amend a lawsuit after remand. After argument, the court allowed the parties to brief this "amendment after remand" issue – an anachronistic[5] and outdated principle originating from law-of-the-case doctrine. After supplemental briefing, the

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address whether knowledge or culpable conduct must be established (on the part of ownership). Moreover, the state law at issue in *Arcara* required that knowledge had to be established to revoke a license. *Arcara*, 478 U.S. at 697, 705 and 707 (1986).

[4] The oral argument can be accessed on the state court's website, www.5thdca.org, by reviewing oral argument video #05-3522.

[5] The supplemental briefing order allowed the parties to brief *Don Suntan v. Tanning Research Lab., Inc.*, 505 So.2d 35 (Fla. 5th DCA 1987) and analyzing its principles.

appellate court entered an order affirming the final judgement without comment. **App. A.**

Rachel's filed a motion for rehearing en banc and a motion requesting a written opinion due to the inconsistent and conflicting nature of this case. See **App. F**. In other words, if the court determined that Rachel's was not entitled to amend its lawsuit, even though the city never appealed the order allowing the amendment, it should explain its reasoning. On the other hand, if the lower court judgment was affirmed on its merits, the court should likewise explain its analysis so that either this Court or the Florida Supreme Court could review same. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) [important that ambiguous adjudications by state courts do not stand as barriers to determination of federal question]; *Capital Cities Media, Inc. v. Toole*, 466 U.S. 378 (1984) [court may remand case to state court for clarification as to basis for lower court decision].

Both motions were denied without comment. Rachel's now looks to this Court for relief.

REASON FOR GRANTING THE WRIT

AS MATTER OF DUE PROCESS AND FIRST AMENDMENT JURISPRUDENCE, A PROPERTY RIGHT (IN THIS CASE, A VALUED LICENSE) CANNOT BE REVOKED BASED UPON A THEORY OF STRICT LIABILITY OR RESPONDEAT SUPERIOR – AN OWNER'S KNOWLEDGE OF WRONGFUL ACTIVITY OR CULPABLE CONDUCT MUST BE ESTABLISHED

Amendment XIV, Section 1, provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of

> the United States; nor shall any state deprive any person of life, liberty, or **property**, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

A license to operate a business is a property right and cannot be revoked without complying with basic requirements of due process. See *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) [discussion of the contours of a property right]; *Barry v. Barchi*, 443 U.S. 55, 64-65 (1979) [horse trainer's license constituted property, entitling him to a due process hearing]; *Baskey v. Board of Regents*, 347 U.S. 442, 473 (1934) [Douglas J. dissenting]. See also, *Foxy Lady, Inc. v. City of Atlanta*, 347 F.3d 1232, 1236 (11th Cir. 2003) [parties did not dispute that clubs had a constitutionally protected property interest in liquor licenses].

This Court has held on several occasions that administrative or quasi-judicial proceedings (the goal of which is to punish an offending party) must comply with certain basic due process requirements. For instance, the statute at issue in *Bell v. Burson*, 402 U.S. 535 (1971) allowed Georgia to suspend an uninsured motorist's drivers license if the driver failed to post security for the amount of damages claimed by an aggrieved party. Georgia claimed that it was not constitutionally required to provide the motorist a hearing on liability because fault and liability were irrelevant to the statutory scheme. This Court held that the failure of the Georgia laws to afford a motorist a hearing on fault denied him (procedural) due process in violation of the Fourteenth Amendment. For additional cases, see *Goldberg v. Kelly*, 397 U.S. 254 (1970) [due process hearing required prior to revoking welfare benefits]; *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) [employee entitled to hearing under Illinois discrimination

law where hearing was untimely scheduled through no fault of employee].

This Court has also noted that proving "knowledge" on the part of the offending party is an element in determining whether a business can be closed. *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 and 707 (1986) [First Amendment would not aid owner of premises who knowingly allowed violations to persist]. See also, *Alexander v. United States*, 509 U.S. 544, 552 (1993) ["nor were the assets in question ordered forfeited without according petitioner the requisite procedural safeguards, another recurring theme in our prior restraint cases"].

The lower courts have been practically uniform in their determination that the revocation of a license offends constitutional principles unless the government entity establishes that the license holder was involved in the offending conduct, had knowledge of same, or was culpably responsible for it. These cases come in two forms (substantive or procedural) due process and where the business offers protected expressive activity – the First Amendment. *Lee v. City of Newport*, 1991 U.S. App. LEXIS 26785; 1991 W.L. 227750 (6th Cir. 1991); *MDM Restaurants, Inc. v. Dearborn*, 2005 U.S. Dist. LEXIS 31744 (E.D. Mich. 2005); *Cohen v. Schott*, 48 So.2d 154 (Fla. 1950); *Pic 'N Save of Central Florida, Inc. v. Department of Business Regulation*, 601 So.2d 245, 250 (Fla. 1st DCA 1992) [licensee's culpable responsibility is measured in terms of intentional wrongdoing, negligence, lack of diligence in training and supervising employees]; *Heifetz v. Department of Business Regulation*, 475 So.2d 1277 (Fla. 1st DCA 1985); *City of Colorado Springs v. 2354, Inc.*, 896 P.2d 272, 297 (Colo. 1995) [strict liability license suspension provision offends First Amendment]; *Millennium Restaurants*

Group, Inc. v. City of Dallas, 191 F.Supp.2d 802 (N.D. Tex. 2002) [First Amendment/"O'Brien"[6] analysis]; *Millennium Restaurants Group, Inc. v. Dallas*, 181 F.Supp.2d 659 (N.D. Tex. 2001); *Threesome Entertainment v. Strittmather*, 4 F.Supp.2d 710, 727-728 (N.D. Ohio 1998) [automatic imputation of responsibility to owner for employee acts].

The issue before the trial and appellate court was whether Casselberry's ordinance violated the First and Fourteenth Amendments considering that it does not require that Rachel's owners had knowledge of the conduct occurring at the establishment. Casselberry's ordinance, although cleverly written, automatically imputes guilty knowledge to the owner based upon the commission of a criminal act on the owner's property. The city disguises its respondeat superior theory based upon the definitions used and employed in its code. These definitions are so broad that they impose strict liability upon an adult entertainment establishment owner if "crime" occurs on his property. The following are some of the relevant code definitions.

> **Licensee**: Any person, corporation, partnership, or other entity whose application for an adult entertainment establishment or sexually oriented business license has been granted **and any person**, corporation, partnership or other entity who owns **or operates** or controls the establishment or business.
>
> **Operator**: Any person who engages in or performs **any activity** which is necessary to or which facilities [sic] the operation of a sexually

[6] *United States v. O'Brien*, 391 U.S. 367 (1968).

> oriented business or an adult entertainment establishment **including, but not limited to**, the licensee, manager, owner, doorman, bouncer, bartender, disc jockey, sales clerk, ticket taker, movie projectionist, dispatcher, receptionist, attendant or supervisor.
>
> * * *
>
> **Worker**: A person who works, performs, or **provides services** at an adult entertainment establishment or at or for a sexually oriented business, irrespective of whether said person is paid a salary or wage and shall include, **but is not limited to**, employees, independent contractors, subcontractors, lessees, or sub-lessees who work or perform at an adult entertainment establishment or at or for a sexually oriented business. **An operator is a type of worker.**

See **App. D**.

When the Court reviews the actual suspension/ revocation provisions in Casselberry's code (Sections 14-92 and 14-93), it will note that it would be impossible for Rachel's or any other adult entertainment entrepreneur to defend itself since all illegal conduct which occurs on the property is automatically imputed to the owner.

> **(3) The *licensee* or any person** on its or his behalf or **any person listed on the application** pursuant to Section 14-80(b) of this Article has knowingly allowed possession, use, or sale of **controlled substances** on the premises of the establishment or business or when with a customer.
>
> **(4) The licensee or** any person on its or his behalf **or** any person listed on the application pursuant to Section 14-80(b) of this Article has knowingly allowed **prostitution** on the premises

> of the establishment or business or when with a customer.
>
> (5) The *licensee* or any person on its or his behalf or *any person listed* on the application pursuant to Section 14-80(b) of this Article knowingly operated the adult entertainment establishment or sexually oriented business during a period when the licensee's license was suspended.

See **App. E**, Section 14-93(c)(3)(4) and (6).

Here, one would think that the Florida intermediate appellate court ruled against Rachel's on the merits of its case finding the code constitutional. Had this not been the case, the court would have explained at least in cursory fashion how the case was procedurally barred (if that were the court's intent). After all, the trial court found that the ordinance comported with both the First and Fourteenth Amendments – which formed the basis for the claims raised in Rachel's complaint. See **App. B** and **App. G**; *Michigan v. Long*, 463 U.S. 1032, 1041-1042 (1983) [when adequacy of possible state law ground is not clear from the face of the opinion we will accept as the most reasonable explanation that the state court decided the case under federal law].

This is a weighty constitutional issue that should be decided by this Court. If there is any question about whether the lower court reached the "federal" merits, then this case should be remanded to the appellate court to explain its reasoning affirming the final judgment herein. *Michigan v. Long*, 463 U.S. 1032, 1041, n. 6 (1983) [court is not foreclosed from remanding the case for clarification as to the basis for the state court's decision]; *Capital Cities*

Media, Inc. v. Toole, 466 U.S. 378 (1984) [remanded for clarification].

CONCLUSION

Based upon the foregoing, Seminole Entertainment, Inc. requests that this Court grant its petition.

Respectfully submitted this 8th day of February, 2007.

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APPENDIX A

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 2006

SEMINOLE ENTERTAINMENT, INC. D/B/A RACHEL'S,

Appellant,

v.

CITY OF CASSELBERRY, FLORIDA,

Appellee. /

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

Case No. 5D05-3522

Decision filed September 5, 2006

Appeal from the Circuit Court
for Seminole County,
Debra S. Nelson, Judge.

Victor L. Chapman and R. Steven Ruta,
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PER CURIAM.

AFFIRMED.

PLEUS, C.J., GRIFFIN, J., and COHEN, J., Associate Judge, concur.

APPENDIX B

IN THE CIRCUIT COURT FOR THE
EIGHTEENTH JUDICIAL CIRCUIT, IN AND
FOR SEMINOLE COUNTY, FLORIDA

CASE NO. 01-CA-248-16-P

SEMINOLE ENTERTAINMENT, INC.,
d/b/a RACHEL'S,

Plaintiff,

vs.

CITY OF CASSELBERRY, FLORIDA
a municipal corporation,

Defendant.
_____/

FINAL SUMMARY JUDGMENT

This action has been a heavily litigated case regarding the revocation of the plaintiff's adult entertainment license as a result of criminal activities occurring on its premises. The plaintiff has filed two separate actions with this court, one a petition for writ of certiorari in which the plaintiff asked the Court to find that there was a lack of procedural due process and the other original civil complaint for declaratory judgment and injunctive relief. The Court denied the petition for writ of certiorari and later awarded summary judgment to the defendant in the original civil action on the basis of *res judicata*. The Fifth District Court of Appeal affirmed the denial of the petition for writ of certiorari in *Seminole Entertainment, Inc. v. City of Casselberry*, 813 So.2d 186 (Fla. 5th DCA 2002), and later affirmed the order of summary judgment as to all but five paragraphs. *Seminole Entertainment, Inc. v. City of Casselberry*, 866 So.2d 1242 (Fla. 5th DCA 2004).

Further review of these orders was denied at all levels. In a separate federal action, the Middle District Court denied the Plaintiff's 42 U.S.C. § 1983 claims on the basis of *res judicata*. That order was affirmed by the Eleventh Circuit Court of Appeals.

The ultimate result of all of these proceedings is that this Court was to reconsider the claims raised in paragraphs 29-32 and 40 of the complaint. However, in September, 2004, the plaintiff, with leave of court, filed an amended complaint raising one count for violation of civil rights, one for declaratory judgment, and one for a permanent injunction. The allegations contained in paragraphs 28-32 and 40 of the original complaint were not included in the amended complaint, and therefore, have been abandoned. Both parties have again moved for summary judgment.

Procedurally, the plaintiff's claims are barred. While this Court did allow for amendment of the complaint, it cannot ignore the effect of the Law of the Case Doctrine. This litigation originally commenced in 2001. There was no reason that a claim under 42 U.S.C. § 1983 could not have been filed earlier. When this Court ruled and the case was appealed, the Fifth District affirmed the summary judgment, except as to a few limited issues. The Fifth District stated

> [o]n the other hand, among the myriad constitutional complaints Rachel's has asserted in the action below, there are a few that it chose not to assert in *Rachel's II*. Based on our review, this appears to include the claims in paragraphs 29-32 and 40 of the complaint. Accordingly, these constitutional claims are not barred by the prior

> litigation and to that extent, the trial court erred in entering summary judgment on them.

Seminole Entertainment, 866 So.2d at 1245. "[This] remand phrased in language which limits the issues for determination preclude[s] consideration of new matters affecting the cause," *City of Palm Bay v. Dep't of Transportation*, 588 So.2d 624 (Fla. 1st DCA 1991). In its amendment, the plaintiff could have added additional ultimate facts and restated the same claims; the law of the case, however, precludes the plaintiff from setting forth new claims for relief. Therefore, summary judgment should be awarded to the defendant, as the plaintiff does not seek any available claim for relief.

The doctrine of *res judicata* does not apply to the entire 42 U.S.C. § 1983 action when considering the history of this case. The plaintiff's arguments presented in paragraphs 11, 12, 15, and 16 of the amended complaint have been addressed and denied on their merits in the plaintiff's certiorari action. Therefore, insofar as the § 1983 action is based upon violations of these provisions, such claims are barred by *res judicata*. The federal action, dismissed on the basis of *res judicata*, has little bearing on this case. As pointed out in the defendant's motion, the first prong of the test for *res judicata* is that there must be a final judgment on the merits. *See Albrecht v. State*, 444 So.2d 9 (Fla. 984 [sic]). The federal decision was not made on its merits; the 42 U.S.C. § 1983 claim was denied on procedural grounds. Therefore, this state claim cannot be dismissed on the basis of *res judicata*, as there has never been a determination of this particular claim on its merits. Moreover, this is not a subsequent or separate lawsuit; it is the same action that the parties have been litigating for over three years. Therefore, there is no possibility of

inconsistent judgments, one of the evils justifying the *res judicata* doctrine.

In the event that the summary judgment awarded on procedural grounds is found to be erroneous, to preserve judicial resources, this Court will also consider the separate motions on their merits. The below analysis is an independent and alternative ruling which would be made if the appellate court was inclined to reverse and remand the summary judgment.

The parties agree that there are no disputed facts and that this cause should be decided by summary judgment. Plaintiff alleges in its amended complaint that Sections 14-92 and 14-93 of the Casselberry Adult Entertainment Code (the "Code") are: arbitrary and capricious; violate due process; and, fail as a strict liability ordinance.

ARBITRARY AND CAPRICIOUS ARGUMENT:

Plaintiff's claim that the Code provisions are arbitrary and capricious is without merit. The Code provisions serve a substantial and important governmental interest and are rationally related to a legitimate governmental purpose. *Gatean. v. County of* Orange 80 F.Supp.2d 1331, 1340 n.12 (M.D. Fla. 1999). The city relied upon studies and other ordinances in passing the Code; therefore, there is factual support for its findings. *Doe v. City of Minneapolis*, 898 F.2d 612 (8th Cir. 1990).

DUE PROCESS ARGUMENT:

The plaintiff's claim that the Code violates due process because it does not require an adjudication, conviction, or finding of guilt to trigger sanctions is also without merit. The plaintiff has not provided any authority suggesting that such a threshold is necessary in a civil

revocation proceeding. The City's burden of proof, per the Code, is a preponderance of the evidence. As such, there is no cause to require a preliminary showing that a crime occurred beyond a reasonable doubt, as would be required for a conviction. Since the amended complaint has failed to set forth any violation of the plaintiff's civil rights, summary judgment should be awarded to the defendant.

STRICT LIABILITY ARGUMENT:

The plaintiff's final claim is that this is a strict liability Code and therefore invalid. Based upon the definitions set forth in the Code, any violation of the law on the premises of Rachel's automatically imputes knowledge to the owner. As such, the license is subject to revocation on a theory or *respondiat* [sic] *superior*. The plaintiff cites several cases to support the theory that this type of code is invalid. However, the City of Casselberry has cured each of the deficiencies which caused those ordinances to be found unconstitutional. Therefore, the plaintiff's motion should be denied, as the Casselberry Code is not a strict liability code.

The first case cited is that of *Millennium Restaurants Group, Inc. v. City of Dallas*, 191 F.Supp.2d 802 (N.D. Tex. 2002). In *Millennium Restaurants*, the chief of police for the city of Dallas was required to revoke an adult entertainment license when there were two or more criminal convictions of club employees within a 12 month period. There was no requirement that the owner have knowledge of the convictions. The federal court held that such a scheme was unconstitutional. The Casselberry scheme at issue differs in one important regard from the Dallas ordinance stricken in *Millennium Restaurants*. The Casselberry Code contains a knowledge requirement. According to

section 14-92 of the Code, an adult entertainment license may be revoked when the licensee or any person on its behalf knowingly allows certain activities to occur on the premises. While the plaintiff takes issue to the broad definition of licensee, the fact that knowledge is required distinguishes the case from *Millennium Restaurants.*

Similarly, the case of *City of Colorado Springs v. 2354, Inc.*, 896 P.2d 272 (Col. 1995), is distinguishable. In *Colorado Springs*, the ordinance allowed the city to choose whether to revoke or suspend a license. Such a scheme was unconstitutional because there were no criteria distinguishing when a suspension should be imposed instead of a revocation. The Casselberry Code does not suffer from the same defect. When a violation is committed without the knowledge of ownership, the license is suspended; when ownership is deemed to have knowledge, the license is revoked. This is a sufficient, objective criterion which the city uses to determine the appropriate punishment.

The final case cited in the plaintiff's motion is *Lee v. City of Newport*, 1991 WL 227750 (6th Cir. 1991), an unpublished opinion with limited precedential value. *Lee* is not applicable to the issues at hand, either, as the focus of that case is the failure to limit the types of conduct which would lead to revocation. As stated in *Lee*, any conviction for any crime would lead to revocation, so a bookkeeper who embezzled from the business would subject the license to revocation, even though it is apparent that such a crime would occur without knowledge of the owner. Here, the Casselberry Code specifically limits its application to prostitution and drug offenses that occur on the premises. Therefore, *Lee* is distinguishable as well.

Finally, as to the underlying claim, that the definitions of "licensee" and "operator" are so broad as to subject the license to revocation on a theory of *respondiat* [sic] *superior*. This Court acknowledges that there would be very few scenarios of employee crime which would not attribute knowledge to ownership. However, the Code in question does not restrict protected expression; it prohibits criminal activity and carries only an incidental burden on the plaintiff's nude dancing. *See Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986). In *Arcara*, the United States Supreme Court recognized "the fallacy of seeking to use the First Amendment as a cloak for obviously unlawful public sexual conduct by the diaphanous device of attributing protective expressive attributes to that conduct. First Amendment values may not be invoked by merely linking the words 'sex' and 'books.'" *Id.* at 705. Similarly, in this case, the First Amendment is not invoked by linking the words "sex" and "dancing." Since the First Amendment does not apply, the plaintiff's motion should be denied.

ORDERED:

1. The Plaintiff's Motion for Summary Judgment Addressing Constitutionality of City's Adult License Suspension and Revocation Proceedings is hereby **denied**.

2. Summary Judgment is granted in favor of the Defendant, City of Casselberry.

3. The Plaintiff, Seminole Entertainment, Inc. d/b/a Rachel's, shall take nothing by this action and the Defendant, City of Casselberry, shall go hence without day.

DONE in chambers at Sanford, Seminole County, Florida this 8th day of September, 2005.

/s/ Debra S. Nelson
DEBRA S. NELSON, Circuit Judge

Copies furnished this 8th day of September, 2005 to:

Erin J. O'Leary, Esquire
Usher Larry Brown, Esquire
Brown, Garganese, Weiss & D'Agresta, P.A.
Two Landmark Center
225 East Robinson Street, Suite 660
Orlando, FL 32802-2813

Steven G. Mason, Esquire
1643 Hillcrest Street
Orlando, FL 32803

/s/ [Illegible]
JUDICIAL ASSISTANT

APPENDIX C

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

SEMINOLE ENTERTAIN-
MENT, INC. D/B/A RACHEL'S,

Appellant,

CASE NO. 5D05-3522

v.

CITY OF CASSEL BERRY,
FLORIDA,

Appellee.

_____/

DATE: November 14, 2006

BY ORDER OF THE COURT:

ORDERED that Appellant's Motion for Written Opinion and Appellant's Motion for Rehearing En Banc, filed September 20, 2006, are denied.

I hereby certify that the foregoing is
(a true copy of) the original Court order.

/s/ Susan Wright
SUSAN WRIGHT, CLERK

[SEAL]

cc: Steven G. Mason, Esq.
Erin O'Leary, Esq.
Victor L. Chapman, Esq.

APPENDIX D

CASSELBERRY CODE OF ORDINANCES

Sec. 14-70. Definitions.

The following words and phrases defined in this section and used in this Article shall have the meaning herein prescribed, unless the context clearly suggests otherwise.

* * *

Conviction: A determination of guilt resulting from plea or trial, regardless of whether adjudication was withheld or whether imposition of sentence was suspended.

* * *

Licensee: Any person, corporation, partnership, or other entity whose application for an adult entertainment establishment or sexually oriented business license has been granted and any person, corporation, partnership or other entity who owns or operates or controls the establishment or business.

Operator: Any person who engages in or performs any activity which is necessary to or which facilities the operation of a sexually oriented business or an adult entertainment establishment including, but not limited to, the licensee, manager, owner, doorman, bouncer, bartender, disc jockey, sales clerk, ticket taker, movie projectionist, dispatcher, receptionist, attendant or supervisor.

* * *

Worker: A person who works, performs, or provides services at an adult entertainment establishment or at or for a sexually oriented business, irrespective of whether said person is paid a salary or wage and shall include, but

is not limited to, employees, independent contractors, subcontractors, lessees, or sub-lessees who work or perform at an adult entertainment establishment or at or for a sexually oriented business. An operator is a type of worker.

(Ord. No. 99-934, § I, 6-7-99)

APPENDIX E

CASSELBERRY CODE OF ORDINANCES

Sec. 14-92. Suspension and revocation of license.

The City Manager or his designee shall suspend a license when he or his designee determines that any one (1) of the following has occurred:

(a) For purposes of this Section 14-92, the term "violation" shall mean an incident having occurred at, or by, an adult entertainment establishment or sexually oriented business which is prohibited by the provisions of this Article or made unlawful by F.S. chs. 561, 562, 563, 564, 565, 794, 796, 800, 826, 827, 847, 893 or 895, or an analogous federal statute.

(b) *Inspection of records and premises.* In the event that the City Manager or his designee determines that the licensee or an operator at or of the licensee has refused to allow any inspection of records or premises as required by this Article; the City Manager or his designee may suspend the license for a period not to exceed 30 days.

(c) Illegal Activity/Suspension.

(1) In the event three or more violations occur within a two year period, and convictions result from at least three of the violations, the City Manager or his designee shall, upon the date of the third conviction, notify the licensee that the license shall be suspended for a period of 30 days unless good cause is shown in accordance with this Article, that the violations have not occurred. For purposes of calculating this two year period, the two year period shall be deemed to be those 24 months occurring immediately prior to the

(5) The licensee or any person on its or his behalf or any person listed on the application pursuant to Section 14-80(b) of this Article knowingly operated the adult entertainment establishment or sexually oriented business during a period when the licensee's license was suspended.

(6) Except in the case of an adult motel, the licensee or any person on its or his behalf or any person listed on the application pursuant to Section 14-80 of this Article has knowingly allowed any specified sexual activities to occur on the premises of the establishment or business.

(d) *Effective dates of suspensions and revocations.* Except as otherwise provided in this Article, all periods of suspension and revocation shall become effective 15 days after the City Manager or his designee posts the notice of suspension or revocation at the licensee's establishment, or on the date that the licensee turns in his, her or its license, whichever happens first. The suspension or revocation shall be abated in the event that the licensee files a timely challenge to the suspension or revocation in accordance with the procedures set forth in this Article or upon order of a court of competent jurisdiction. If an adult entertainment establishment or sexually oriented business license is revoked, the licensee shall not be issued another adult entertainment establishment or sexually oriented business license for a period of two years running from the date the revocation actually takes effect after all abatement periods have lapsed.

(e) *Other remedies.* Notwithstanding the provisions of this Section, the City may pursue any and all

other available remedies through any and all other available processes and procedures available to correct violations of City codes. Included within such remedies are the enforcement actions set forth in this Article, actions in a court of competent jurisdiction for injunctive or other appropriate relief, criminal prosecution, code enforcement proceedings, the issuance of citations, the suspension or revocation of permits relating to health or safety matters, and any and all other remedies available under the laws of the State of Florida and the United States.

(Ord. No. 99-934, § I, 6-7-99)

Sec. 14-93. Suspension and revocation proceedings.

(a) *Challenge to suspension or revocation.* If the City Manager or his designee notifies a licensee in writing of the pending suspension or revocation of a license as provided in Section 14-92 of this Article, then the suspension or revocation shall become final and effective fifteen (15) days after mailing to the licensee's record address, posting at the licensed establishment, or actual delivery of the notice to the licensee, unless the licensee first files with the City Manager or his designee a written response stating the reasons why the suspension or revocation is alleged to be in error or inappropriate and a written notice of intent to challenge the suspension or revocation requesting a hearing to determine whether the suspension or revocation will become effective. The suspension or revocation shall be abated in the event that a licensee files a timely challenge to the suspension or revocation in accordance with the procedures of this Article or upon an order of a court of competent jurisdiction. A suspension or revocation already in effect, but not previously challenged

in a suspension or revocation hearing, may be challenged in the same manner but is not abated during the proceedings.

(b) *Hearing on suspension or revocation.* When a licensee files a written response and notice of intent to challenge a pending or existing suspension or revocation then a public hearing to determine if the pending suspension or revocation will become effective and final shall be held by the City Commission. The City Manager or his designee shall notify the City Attorney and any appropriate City offices who shall schedule and provide notice of the hearing date and time.

(1) The suspension or revocation hearing shall be held within thirty (30) days of the City Manager's receipt of a written challenge and request for a hearing by the aggrieved licensee.

(2) The participants before the City Commission shall be the licensee, any witnesses of the licensee, the City Manager or his designee and any witnesses of the City Manager or his designee. All witnesses shall provide their legal name, mailing addresses and telephone number.

(3) The procedures used shall be those typically used in a civil case with the City Manager or his designee having the burden of proof by preponderance of the evidence.

(4) Testimony and evidence may be submitted by any witness but shall be limited to matters directly relating to the grounds for suspension or revocation. Irrelevant, immaterial, or unduly repetitious testimony or evidence shall be excluded.

(5) All testimony shall be under oath. The City Commission shall decide all questions of procedure

and standing. Unless otherwise mutually agreed to between the licensee and the City Manager or his designee, the order of presentation of testimony and evidence shall be as follows:

a. The City Manager or his designee and any witnesses of the City Manager or his designee.

b. The licensee and any witnesses of the licensee.

c. Rebuttal witnesses from the City Manager or his designee.

d. Rebuttal witnesses from the licensee.

e. Summation by the City Manager or his designee.

f. Summation by the licensee.

(6) The City Commission may also call and question witnesses or request additional evidence as the City Commission deems necessary and appropriate.

(7) To the maximum extent practicable, the hearing shall be informal. Reasonable cross examination of witnesses shall be permitted, but questioning shall be confined as closely as possible to the scope of direct testimony.

(8) If the City Commission comes to believe that any facts, claims, or allegations necessitate additional review or response by either the licensee or the City Manager or his designee, then the City Commission may order the hearing continued until an announced date certain, not to exceed thirty (30) days from the date of continuance. The City Commission shall render a final decision on the appeal within sixty (60)

days of the City Manager's receipt of licensee's written notice of challenge.

(9) The City Commission shall render a written decision determining whether the suspension or revocation will become or remain effective at the conclusion of the hearing at which the appeal is decided or as soon as practicable thereafter.

(c) *Filing of decision.* The original of the written decision of the City Commission shall be filed with the City Clerk and copies shall be delivered or mailed to the licensee, the City Manager or his designee and the City Police Department.

(d) Judicial Review. Any person who participated in a suspension or revocation hearing before the City Commission and who is aggrieved by the decision of the City Commission may immediately challenge the decision in any court of competent jurisdiction pursuant to the Rules of Procedure of that court. The record of the hearing shall consist of the complete record of the proceedings before the City Commission. The City Commission's decision shall be promptly reviewed by the court.

(e) *Requirement of exhaustion procedures.* Judicial review of a suspension or revocation, or related hearing or appeal proceedings, shall be available only after the administrative procedures and remedies set forth in this Section have been exhausted.

(f) *Notice of final suspension or revocation.* If no response or request for a suspension or revocation hearing is filed within 15 days of the notice of a pending suspension or revocation, or if the licensee who requested the hearing does not appear at the suspension or revocation hearing after notice, or if the City Commission decides after a hearing that a pending suspension or revocation will become final, then the City Manager or his designee

shall issue to the licensee notice of final suspension or revocation of the adult entertainment license and mail or arrange delivery of the notice to the licensee's record address.

(g) *Effective Date of Suspension or Revocation.* The suspension or revocation of a license shall take effect the day after delivery of a notice of final suspension or revocation to the licensee in person, by posting on the licensed establishment, or by mail to the licensee's record address, or on the date the licensee surrenders the license, whichever happens first. The licensee shall immediately return and surrender a revoked license to the City Manager or his designee or surrender the revoked license, upon demand, to a member of the Police Department.
(Ord. No. 99-934, § I, 6-7-99)

APPENDIX F

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FIFTH DISTRICT

SEMINOLE ENTERTAINMENT, INC., d/b/a RACHEL'S,
Appellant,

v.

CASE NO.: 5D05-3522

CITY OF CASSELBERRY, FLORIDA,
Appellee.

RACHEL'S MOTION FOR WRITTEN OPINION

TO: HONORABLE ROBERT J. PLEUS, JR.
HONORABLE JACQUELINE R. GRIFFIN
HONORABLE JAY P. COHEN
FIFTH DISTRICT COURT OF APPEAL
300 SOUTH BEACH STREET
DAYTONA BEACH, FLORIDA 32114

The Appellant, "Rachel's," hereby states as follows:

1. Rachel's respectfully requests that the Court issue a written opinion explaining the Court's PCA-affirmance, especially considering the long history of this litigation and the questions posed during the oral argument held July 12, 2006.

2. During argument, Judge Griffin was adamant that *Don Suntan v. Tanning Research Laboratories, Inc.*, 505 So.2d 35 (Fla. 5th DCA 1987) acted to bar Rachel's relief. In contrast, Judge Pleus indicated that he had concerns that Casselberry's adult ordinances may run afoul of the dictates of *United States v. O'Brien*, 391 U.S. 367 (1968).

> I have a real difficult time trying to figure out how you can square the existing ordinance and what he's attacking in that ordinance with *O'Brien*.

Oral Argument Video at counter 29:16 through 29:23.[1]

* * *

> It's the fourth prong that I'm trying to get you to.

Oral Argument Video at counter 31:42 through 31:43.

3. Considering Judge Griffin's concerns regarding *Don Suntan* this attorney requested supplemental briefing.

4. In an order dated July 12, 2006, this Court allowed the parties to submit supplemental briefs on *Don Suntan* and its underlying principles.

5. This attorney spent a great deal of time researching the history and legal origins of *Don Suntan* – which cost Rachel's owner a large amount in attorney's fees. What followed was a 23-page supplemental brief submitted by Rachel's explaining that *Don Suntan* no longer constitutes "good law," or in the alternative, is inapplicable to this litigation. See **Tab A.**

6. In its response supplemental brief, Casselberry failed to address in any substantive manner the specific points outlined in Rachel's brief.

7. Thirty-five days passed before this Court entered its PCA. Because the Court entered a PCA with no citation

---

[1] The oral argument can be accessed on this Court's website by reviewing oral argument video #05-3522.

of authority, it can only be assumed that this Court decided that *Don Suntan* no longer constitutes "good law" or, in the alternative, has no bearing on this appeal.

8. If this assumption is correct, and considering Judge Pleus's concerns regarding the constitutionality of Casselberry's ordinance, it is perplexing that this Court entered a PCA rather than addressing the merits of this case.

9. The issue is even more disconcerting considering that these ordinances remain on the books and can once again be applied against a license holder.

10. Rachel's would respectfully request that this Court enter a written opinion explaining the basis for its affirmance.

11. If the Court believes that *Don Suntan* is applicable to Rachel's case, the Court should address the issue squarely so that same can be reviewed by the Florida Supreme Court. Alternatively, if *Don Suntan* no longer holds water, this Court should clear up the issue so that future litigants will know this Court's position on the matter.

12. If *Don Suntan* is not the make-or-break issue (which is what triggered supplemental briefing in the first place), then this case should be decided on its merits. None of the panel members expressed any sentiments that they thought the ordinance was constitutional on its merits. Judge Pleus indicated to the contrary. The law is clear that a license cannot be suspended unless the city establishes that the owner was personally involved in the conduct or was culpably responsible for it. If the Court disagrees on this point, it should explain its thought

process in a written opinion so that Rachel's can seek relief with the Florida Supreme Court. The absence of a written opinion in this case is patently and fundamentally unfair.

13. As Judge Mills stated 25 years ago, litigants deserve this consideration.

> For the information and benefit of the attorneys and their clients, I shall not render a per curiam affirmed opinion hereafter.
>
> First, I shall sign all opinions and cases assigned to me for primary responsibility.
>
> Second, I shall write a short opinion in each case assigned to me and shall tersely give the reason for affirming each issue raised by the appellant or cross-appellant.
>
> I hope that this action by me will answer the frequent complaints about per curiam affirmed decisions. The attorneys and their clients will generally know why their cases are affirmed. The possible remedies from adverse decisions will be preserved for consideration by the Supreme Court.

Davis v. Sun Banks of Orlando, 412 So.2d 937 (Fla. 1st DCA 1982).

14. In accordance with Rule 9.330(a), Fla.R.App.P., this attorney provides the requisite certification.

> I express a belief, based upon a reasoned and studied professional judgment, that a written opinion will provide a legitimate basis for Supreme Court review because:
>
> *DonSuntan v. Tanning Research Laboratories Inc.,* 505 So.2d 35 (Fla. 5th DCA 1987) and the

cases upon which it is based are outdated and have been superceded by both the Florida Rules of Civil Procedure and opinions from the Florida Supreme Court. See cases cited in Rachel's supplemental brief, **Tab A**. Alternatively, *Don Suntan* has no application to this case and cases from both the Florida Supreme Court and other district courts of appeal (as cited in **Tab A**) clearly demonstrate that Rachel's was entitled to amend its lawsuit and thus reliance upon *Don Suntan* to reach a contrary conclusion would form a legitimate basis for Florida Supreme Court review.

Moreover, if this Court decides (in a written opinion) that Rachel's should be denied relief on the merits regarding the constitutionality of Casselberry's ordinance then such an opinion would conflict with numerous Florida authorities which require that "knowledge" be proven in order to suspend or revoke a license. These authorities include *Cohen v. Schott,* 48 So.2d 154 (Fla. 1950) [reasonable standard of diligence is standard]; *Taylor v. State,* 194 So.2d 321, 329 (Fla. 2nd DCA 1967) [reasonable precautions]; *Pic 'N Save of Central Florida, Inc. v. Department of Business Regulation,* 601 So.2d 245, 250 (Fla. 1st DCA 1992) [culpable responsibility is measured in terms of own intentional wrong doing or lack of diligence in training and supervision of employees]. Thus, a written opinion affirming this case on the merits would likely result in the Florida Supreme Court granting review in this case.

Respectfully submitted this 19th day of September, 2006, at Orlando, Orange County, Florida.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this 19th of September,

2006, via U.S. Mail Delivery to **Erin O'Leary, Esquire**, Brown, Garganese, Weiss & D'Agresta, PO Box 2873, Orlando, FL 32802; with the original to the **Clerk of Court**, District Court of Appeal of the State of Florida, Fifth District, 300 S. Beach Street, Daytona Beach, FL 32114 via Overnight Delivery.

STEVEN G. MASON, P.A.
1643 HILLCREST STREET
ORLANDO, FLORIDA 32803
TELEPHONE (407) 895-6767
FACSIMILE (407) 895-2090

BY: _____
STEVEN G. MASON
FLORIDA BAR #842508

APPENDIX G

IN THE CIRCUIT COURT, EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR SEMINOLE COUNTY, FLORIDA

SEMINOLE ENTERTAINMENT, INC., d/b/a RACHEL'S,

Plaintiff,

CASE NO.: 01-CA-248-16P

v.

CITY OF CASSELBERRY, FLORIDA,

Defendant.

RACHEL'S MOTION FOR SUMMARY JUDGMENT ADDRESSING CONSTITUTIONALITY OF CITY'S ADULT LICENSE SUSPENSION AND REVOCATION PROVISIONS

TO: HONORABLE DEBRA S. NELSON
SEMINOLE COUNTY COURTHOUSE
301 PARK AVENUE NORTH
SANFORD, FLORIDA 32771

The Plaintiff, **Seminole Entertainment, Inc.**, hereinafter "Rachel's," files this motion pursuant to Rule 1.510, Fla.R.Civ.P.

I
THE CODE PROVISIONS AT ISSUE

Rachel's is challenging the constitutionality of Sections 14-92 and 14-93 of Casselberry's Adult Entertainment code.

Although there have been some amendments to these provisions since the filing of this lawsuit, these changes are not germane to this discussion because the fabric of the ordinances remains the same.

For the court's benefit, the challenged provisions are set forth below.

> Sec. 14-92. Suspension and revocation of license.
>
> The City Manager or his designee **shall suspend**[1] a license when he or his designee determines that any one (1) of the following has occurred:
>
> (a) For purposes of this Section 14-92, the term "**violation**" shall mean **an incident**[2] having occurred at, or by, an adult entertainment establishment or sexually oriented business which is prohibited by the provisions of this Article or made unlawful by F.S. chs. 561, 562, 563, 564, 565, 794, 796, 800, 826, 827, 847, 893 or 895, or an analogous federal statute.
>
> (b) *Inspection of records and premises.* In the event that the City Manager or his designee determines that the licensee or an operator at or of the licensee has refused to allow any inspection of records or premises as required by this Article;

---

[1] All emphasis has been added in this paper unless otherwise noted.

[2] Simply meaning that neither a criminal arrest, prosecution, or conviction is necessarily required under this section. Further, this "incident" merely needs to occur at the business and need not be based upon any proof of knowledge or criminal nexus to the establishment's ownership.

the City Manager or his designee may suspend the license for a period not to exceed 30 days.

(c) Illegal Activity/Suspension.

(1) **In the event three or more violations occur within a two year period, and *convictions*[3]** result from *at least* three of the violations, the City Manager or his designee shall, upon the date of the third conviction, notify the licensee that the license shall be suspended for a period of **30 days** unless good cause is shown in accordance with this Article, that the violations have not occurred. For purposes of calculating this two year period, the two year period shall be deemed to be those 24 months occurring immediately prior to the violation occurrence date for which the 30 day suspension is sought.

(2) **In the event one (1) or more violations occur within a two (2) year period from the date of the last violation** occurrence date from which the conviction resulted in a thirty (30) day suspension pursuant to subsection (b)(1), but not including any time during which the license was effectively suspended, and a conviction results from one (1) or more of the violations, the City Manager or his designee shall, upon the date of the latest conviction, provide notice to the licensee that the license shall **be suspended** for a period of ninety **(90) days** unless good cause is shown in accordance with this Article that the violation has not occurred.

---

[3] As the court will see in reviewing this memorandum, a conviction under Casselberry's code does not require a formal and final adjudication of guilt. Furthermore, Casselberry is not required to establish convictions for all of the violations – just "at least three . . . "

(3) **In the event one (1) or more violations occur within a two (2) year period from the date of the last violation** occurrence date from which the conviction resulted in a ninety (90) day suspension pursuant to subsection (b)(2), but not including any time during which the license was effectively suspended, and a conviction results from one (1) or more of the violations, the City Manager or his designee shall, upon the date of the latest conviction, provide notice to the licensee that the license shall be **suspended** for a period of One Hundred Eighty **(180) days** unless good cause is shown in accordance with this Article that the violation has not occurred.

(d) ***Revocation.***[4] The City Manager or his designee shall revoke a license when he or his designee determines that any one (1) of the following has occurred.

(1) There has been one (1) or more violations that have occurred within a two (2) year period from the date the last violation occurrence date from which the conviction resulted in a One Hundred Eighty (180) day suspension pursuant to (c)(3), but not including any time during which the license was effectively suspended, and a conviction results from one (1) or more of the violations, the City Manager or his designee shall, upon the date of the latest conviction, provide notice to the licensee that the license shall be revoked unless good cause is shown in accordance with this Part that the violation has not occurred.

---

[4] Rachel's license was revoked under this section (rather than suspended).

(2) The licensee or any person on its or his behalf or any person listed on the application pursuant to Section 14-80(b) of this Article, gave false or misleading information in the material submitted during the application process.

(3) The licensee or any person on its or his behalf or **any person listed on the application** pursuant to Section 14-80(b) of this Article has knowingly allowed possession, use, or sale of **controlled substances** on the premises of the establishment or business or when with a customer.

(4) The licensee **or** any person on its or his behalf **or** any person listed on the application pursuant to Section 14-80(b) of this Article has knowingly allowed **prostitution** on the premises of the establishment or business or when with a customer.

(5) The licensee or any person on its or his behalf or any person listed on the application pursuant to Section 14-80(b) of this Article knowingly operated the adult entertainment establishment or sexually oriented business during a period when the licensee's license was suspended.

(6) Except in the case of an adult motel, the licensee **or** any person on its **or** his behalf or any person listed on the application pursuant to Section 14-80 of this Article has knowingly allowed any **specified sexual activities** to occur on the premises of the establishment or business.

(d) *Effective dates of suspensions and revocations.* Except as otherwise provided in this Article, all periods of suspension and revocation shall become effective 15 days after the City Manager

> or his designee posts the notice of suspension or revocation at the licensee's establishment, or on the date that the licensee turns in his, her or its license, whichever happens first. The suspension or revocation shall be abated in the event that the licensee files a timely challenge to the suspension or revocation in accordance with the procedures set forth in this Article or upon order of a court of competent jurisdiction. If an adult entertainment establishment or sexually oriented business license is revoked, the licensee shall not be issued another adult entertainment establishment or sexually oriented business license for a period of two years running from the date the revocation actually takes effect after all abatement periods have lapsed.
>
> (e) *Other remedies.* Notwithstanding the provisions of this Section, the City may pursue any and all other available remedies through any and all other available processes and procedures available to correct violations of City codes. Included within such remedies are the enforcement actions set forth in this Article, actions in a court of competent jurisdiction for injunctive or other appropriate relief, criminal prosecution, code enforcement proceedings, the issuance of citations, the suspension or revocation of permits relating to health or safety matters, and any and all other remedies available under the laws of the State of Florida and the United States.

See **Appendix A** [City's Adult Code].

To summarize, Casselberry's Adult Code provides that it can either suspend **or** revoke an adult entertainment license based upon certain "criteria." The suspension provisions, Section 14-92, Subsection (c)(1) through (3) are

all based upon what generically can be referred to as an escalating pattern of conduct. In other words, if a license is suspended for thirty days and additional criminal activity and criteria are satisfied, a subsequent suspension can be enhanced to ninety days and thereafter to 180 days. Ultimately, the penalty can be enhanced to the most severe sanction – revocation. However, that is not what occurred in Rachel's case.[5] Rather, the city proceeded under its **catch-all revocation provisions** at Section 14-92(d)(3), (4) and (6). Those provisions are absurdly and unconstitutionally unfair. For instance, under subsection 3 of the revocation provision, a license can be revoked if the **licensee** knowingly allows possession, use or sale of controlled substance; **or any person** on the licensee's behalf knowingly allows same; **or if any person** who is listed on the application for the issuance of an adult entertainment license pursuant to Section 14-80(b) knowingly allows such activities to occur.

The devil is in the definitions. For instance, the definition of licensee under the city's code at Section 14-70 includes "operators." The definition of an operator includes any person who works at the establishment irrespective of their position or function. What this means is that if any person at the establishment allows certain criminal activity to occur, the license can be revoked. The provisions in subsection (3), (4) and (5) are even broader because they provide that if any person listed on the adult entertainment application knowingly allows certain criminal

[5] By way of background, Rachel's is in the business of offering (non-obscene) female dance entertainment for the enjoyment of its patrons as guaranteed under the First Amendment. See affidavit of Robert Kelley filed under separate cover.

activity to occur this activity is **automatically imputed** to the license holder and owner of the establishment – mandating the revocation and closure of the business.[6]

II
CHALLENGES

Rachel's has levied a number of challenges to the referenced provisions. Although these challenges are distinct, they weave together to form a convincing argument that these provisions are constitutionally infirm.[7] For the court's benefit, the specific challenges are set forth below as contained in the amended complaint.

1. Sections 14.92 and 14-93 violate the test set forth in *United States v. O'Brien,* 391 U.S. 367 (1968), and thus violate the First and Fourteenth Amendments to the United States Constitution.

2. The terms and definitions for "employee" and "operator," referenced and defined in Casselberry's Adult Code, Sections 14-92, 14-93 and 14-66), are so broad that they vest undue discretion with the Casselberry City Commission and, in effect, impose strict or unconstitutional liability upon the ownership of adult entertainment establishments such as Rachel's and thus violate the First,

---

[6] The definitions at issue are set forth in detail at pages 9-10 of this motion and are also included in Casselberry's adult entertainment code which is attached to this motion as **Appendix A**.

[7] It naturally follows that if these code provisions are unconstitutional, then the city improperly and unconstitutionally revoked Rachel's adult entertainment license and caused Rachel's to close for two years – necessitating the payment of appropriate business damages.

Fifth and Fourteenth Amendments to the United States Constitution.

3. Sections 14-92 and 14-93 of the Casselberry Adult Entertainment Code are arbitrary and capricious and thus violate the First, Fifth and Fourteenth Amendments to the United States Constitution.

4. The term and definition for "violation," as contained and referenced within Sections 14-92 and 14-93 violates due process and the First Amendment in that it does not require a criminal conviction, court process, or an adjudication in order for the city to revoke an adult entertainment license.

5. The suspension and revocation procedures established in Sections 14-92 and 14-93 violate due process and equal protection under the First, Fifth and Fourteenth Amendments in that there are no constitutional criteria upon which the city commission could base its decision or conduct a hearing.

6. The Rachel's revocation order and Sections 14-92 and 14-93 do not further a substantial government interest and do not constitute the least-restrictive means to achieve the City's goal, and thus same violates the First and Fourteenth Amendments to the United States Constitution.

III
LEGAL MEMORANDUM

As the court is aware, this litigation commenced upon the city's revocation of Rachel's adult entertainment license. Rachel's license was revoked based upon a novel legal theory which hinges upon the code provisions at

hand. The thrust of the city's revocation claim was that workers at "Rachel's" (allegedly) violated the law and that those violations could be imputed to Rachel's ownership, thus creating a springboard to close the business. In other words, the city was not required to establish any nexus between the (alleged) unlawful activity and Rachel's ownership. These code provisions do not require culpable conduct on the part of ownership or actual knowledge of the incidents. In fact, the city did not even attempt to hide its theory. Rather, the revocation decision, as quoted below, clearly reveals that the city's legal theory was based upon "respondeat superior."

> 7. Section 14-70 of the City's Adult Entertainment Code also defines "Licensee," in relevant part, as "any person . . . who . . . **operates** or controls the establishment or business." (Exhibit 22)
>
> 8. "Operator" is defined in Section 14-70 of the City Code as:
>
> Operator. Any person who engages in or **performs any activity** which is necessary to or which facilitates the operation of a sexually oriented business or an adult entertainment establishment including, but not limited to, the licensee, manager, owner, doorman, bouncers, bartender, disc jockey, sales clerk, ticket taker, movie projectionist, dispatcher, receptionist, attendant or supervisor. (Exhibit 22)
>
> * * *
>
> 43. Additionally, Section 14-92(c)(6) states, in pertinent part, that an adult entertainment license shall be revoked when "**any person listed on the Application** pursuant to Section 14-80 of this Article has knowingly allowed any specified

sexual activities to occur on the premises of the establishment or business."

44. Section 14-80 establishes the documents that shall accompany the Application. Section 14-80(i) requires the following:

14-80(i): The applicant shall provide the names of the workers for the proposed establishment or business, if known, or, if presently unknown a statement to that effect.

45. The term "worker" is defined as follows in Section 14-70 of the City's Adult Entertainment Code:

Worker. A person who works, performs, or provides services at an adult entertainment establishment or at or for a sexually oriented business, irrespective of whether said person is paid a salary or wage and shall include, but is not limited to, employees, independent contractors, subcontractors, lessees, or sub-lessees who work or perform at an adult entertainment establishment or at or for a sexually oriented business. **An operator is a type of worker.**

City Revocation order dated January 31, 2001, **Appendix B.**

Like so many things, especially in cases as politically charged as this one, the devil is in the definitions. As stated by Mr. Brown at the recent hearing on Rachel's motion to amend the complaint, Rachel's has levied a number of federal/U.S. Constitutional challenges to Casselberry's adult code – whereas its previous challenges were state oriented.

> Now it's under Section 1983, which is you do have concurrent jurisdiction with the federal courts for 42 USC Section 1983 Civil Rights Claim. And he is saying that the City of Casselberry's ordinance violates the Federal Constitution's First, Fifth, and Fourteenth Amendments. **Doesn't even talk about the Florida Constitution anymore, so that's completely different from what the Fifth DCA had before it.**

Transcript at 20, **Appendix C** [Hearing on Motion to Amend].

The court will note in reviewing Casselberry's code that it repeatedly uses the words "violations," "conviction," "worker," "operator," and "licensee." These words are all defined at Section 14-70 of the code as follows:

> **Violation**: (a) For purposes of this Section 14-92, the term "**violation**" shall mean **an incident** having occurred at, or by, an adult entertainment establishment or sexually oriented business which is prohibited by the provisions of this Article or made unlawful by F.S. chs. 561, 562, 563, 564, 565, 794, 796, 800, 826, 827, 847, 893 or 895, or an analogous federal statute.
>
> **Conviction**: A determination of guilt resulting from plea or trial, **regardless** of whether adjudication was withheld or whether imposition of sentence was suspended.
>
> **Worker**: A person who works, performs, or **provides services** at an adult entertainment establishment or at or for a sexually oriented business, irrespective of whether said person is paid a salary or wage and shall include, **but is not limited to**, employees, independent contractors, subcontractors, lessees, or sub-lessees who

work or perform at an adult entertainment establishment or at or for a sexually oriented business. **An operator is a type of worker.**

Operator: Any person who engages in or performs **any activity** which is necessary to or which facilities the operation of a sexually oriented business or an adult entertainment establishment **including, but not limited to**, the licensee, manager, owner, doorman, bouncer, bartender, disc jockey, sales clerk, ticket taker, movie projectionist, dispatcher, receptionist, attendant or supervisor.

Licensee: Any person, corporation, partnership, or other entity whose application for an adult entertainment establishment or sexually oriented business license has been granted **and any person**, corporation, partnership or other entity who owns or **operates** or controls the establishment or business.

Turning back to Section 14-92 and 14-93, the court will see that these provisions permit and authorize the city to revoke or suspend an adult license if it is established that a "licensee" **or** any person on its or his behalf **or** any person listed on the application knowingly allows certain illegal activities to occur on the premises. Based upon the broad definitions employed by the city, it has the absolute power to revoke a license simply by establishing that criminal activity occurred on the premises – irrespective of whether the owner of the business had knowledge or was culpably responsible for the conduct. This is nothing more than a clever artifice to suspend and revoke a license based upon respondeat superior. See Section 14-92(3)(4)(5). Again, it cannot be emphasized enough that the term licensee is defined to include an operator which is then

defined to include any worker at the establishment–any person who conducts any business on the premises irrespective of their responsibility or scope of employment.

The essence of Rachel's argument is that these city provisions violate the First, Fifth and Fourteenth Amendments because they are arbitrary, over broad, violate due process, and are not narrowly tailored as required under *United States v. O'Brien,* 391 U.S. 367 (1968) and its progeny.

The federal cases which have interpreted the United States Constitution in light of suspension and revocation provisions such as Casselberry's demonstrate that these provisions are wholesale unconstitutional.

The starting place in the equation is the federal court's decision in *Millennium Restaurants Group, Inc. v. City of Dallas,* 191 F.Supp.2d 802 (ND TX 2002). The plaintiff, doing business as Cabaret Royale, had its adult license suspended by Dallas. The provision which the city proceeded under provided as follows:

> The chief of police shall revoke a license if the chief of police determines that one or more of the following is true:
>
> * * *
>
> On two or more occasions within a 12-month period, a person or persons committed an offense occurring in or on the licensed premises of a crime listed in Section 41A-5(a)(8)(A) for which a conviction has been obtained, and the person or persons were employees of the sexually oriented business at the time the offenses were committed.

Millennium Restaurants at 805.

Under Dallas's provisions, it was not necessary that the license holder have knowledge of the employees' alleged violations or otherwise be culpably responsible for same. In Dallas's code, like Casselberry's, the conduct of an employee was automatically imputed to the license holder. Millennium contended, among other things, that Dallas's revocation provision ran a foul [sic] of the First Amendment because it violated the four-part test outlined by the Supreme Court in *United States v. O'Brien,* 391 U.S. 367 (1968).

> While Millennium concedes that the city had the authority to license sexually oriented businesses, it argues that the city regulations in this case do not pass muster under the third and fourth prongs of *O'Brien.* The third prong of *O'Brien* is violated when the governmental interest is related to the suppression of free expression.

391 U.S. at 377.

The court found that Dallas's ordinance violated the First Amendment because it did not further the city's interest that license holders adhere to the law. It also found that the ordinance was not narrowly tailored and was overly broad in imposing revocation liability on an owner without establishing culpable conduct.

> The court finds that the strict liability feature of the ordinance is constitutionally suspect because **it does not relate to or further the governmental interest of assuring law abiding licensees.**[8]

---

[8] Obviously, if that was the purpose of the law, it would require knowledge or culpable conduct on the part of ownership.

> **The fourth prong of *O'Brien* is likewise violated because the regulation in question is not narrowly tailored to do only what is necessary to achieve a substantial governmental interest.** Revocation of a business license based on two convictions of employees for public lewdness over a one year period, without requiring any knowledge on the part of management, is a greater restriction on free expression that is essential to furtherance of the governmental interest because the predicate offenses do not tend to show that management is careless, reckless or incompetent.

Millennium Properties at 808.

Finally, the court refused to accept Dallas's argument that it (like Casselberry) could suspend or revoke an adult license under a respondeat superior theory without violating the First Amendment. *Id.* at 809. See also, *Millennium Restaurants Group, Inc. v. Dallas,* 181 F.Supp.2d 659 (ND TX 2001) [entry of preliminary injunction].

This refrain was repeated by the Colorado Supreme Court in invalidating a similar adult entertainment ordinance.

> Section 8-1-801(D) of the code requires suspension or revocation of any license if a licensee or any agent or employee thereof violates any law. This section makes no reference to any *mens rea* requirement. **It thus establishes a strict liability standard.** Such regulations are constitutionally suspect for purposes of First Amendment analysis. (Citations omitted).

City of Colorado Springs v. 2354, Inc., 896 P.2d 272, 297 (Col. 1995).

The thrust of the City of Colorado Springs' ordinance was that the adult entertainment license would be suspended for a period not to exceed six months or revoked if an agent or employee of the "licensee" violated any law and the violation occurred on the licensed premises or related to the conduct or activity which was regulated under the adult licensing scheme. That regulation, like Casselberry's, allowed the city to choose whether to suspend **or** revoke the license. The Colorado Supreme Court found that the provision violated the First Amendment because it was not "narrowly tailored" and there was no criteria distinguishing under what circumstances a suspension would be imposed as compared to a revocation. Because the ordinance was sweeping in nature and not narrowly drawn, it was constitutionally invalid.

That is the same situation presented here. Under Casselberry's code the city manager is entitled to determine whether the license will be suspended or revoked based upon the identical criteria. As stated by the Colorado Supreme Court, these deficiencies, a strict liability standard, lack of sufficient, objective criteria, and the failure to narrowly tailor the ordinance, undermined its constitutional validity.

The federal courts have also soundly condemned and invalidated laws such as Casselberry's as a violation of due process under the Fourteenth Amendment.

> The ordinance permits the revocation of occupational licenses without any showing that the operator had any control over the conduct of employees or that the operator wilfully [sic] ignored prohibited activities or otherwise knew of, should have

> known of, or condoned illegal conduct on the part of the operator's employees, agents, or servants.
>
> * * *
>
> Without both a sufficient showing by the city that the plaintiff's fitness to operate the Brass Bull was effected by the conviction of any of her employees for acts of prostitution or other relevant criminal conduct committed on the premises, such as that she knew or should have known about or condoned such conduct and without allowing the plaintiff the opportunity to present evidence in defense, fairly considered by the decision maker, **the city may not revoke or suspend the plaintiff's occupational license in violation of her right to due process under the Fourteenth Amendment.**

Lee v. City of Newport, 1991 U.S. App. Lexis 26785; 1991 W.L. 227750 (6th Cir. 1991).

The argument in the *City of Newport,* like the issue here, ultimately hinged upon whether the city's ordinance required a sufficient nexus between the conduct of an employee at the establishment and ownership. This deficiency was the hallmark of the Sixth Circuit's opinion that the ordinance was constitutionally defective.

> The effect of the ordinance is either to create a presumption of knowledge or to eliminate any requirement of knowledge on the part of the licensee or operator of illegal activities or prohibited conduct on the premises based simply on the fact of a conviction of a licensee's employee.

Lee at 1991 U.S. App. LEXIS 26785 at *11.

Although the court's analysis appears to directly hinge upon the due process provisions of the Fourteenth

Amendment, nonetheless the analysis is similar to the "*O'Brien*" (First Amendment) analysis in the cases cited above. In its conclusion, the court notes that the city's law allowed it to divest the license holder of a property interest (the license) without establishing any relationship to the evils at which the ordinance was allegedly aimed and by imposing strict liability.

Casselberry's ordinances are even more constitutionally offensive. Not only do they impose a form of strict liability, they allow Casselberry to revoke a license based upon the conduct of an employee who simply happens to be listed on the application for the license submitted to the city. In a similar context, the federal court in New York found a similar ordinance improperly over broad.

> "The requirement that every person with any ownership interest, regardless of how small, signed the application, however, is impermissibly broad." *Brownell v. City of Rochester,* 190 F.Supp.2d 472, 501 (WD NY 2001), quoting *Eastbrooks Books, inc. v. City of Memphis,* 48 F.3d 220, 226 (6th Cir. 1995).

There, the court struck down the license disclosure requirement and required individuals with a minimum twenty percent ownership in the business to sign the application. Here, the city's requirement is far greater. It requires that every person who works at the business be listed on the application and that the conduct (no matter how small or insignificant) of those individuals can automatically be imputed and attributed to ownership – thus resulting in the closure of the business. This is both constitutionally offensive and impermissible under any United States Constitutional analyses.

IV
CONCLUSION

Rachel's is requesting that the court declare Sections 14-92 and 14-93 of Casselberry's Adult Code unconstitutional under the First and Fourteenth Amendments to the United States Constitution.[9] After which, Rachel's is also requesting that the court allow the parties to proceed with discovery for purposes of ascertaining Rachel's reasonable damages associated with the closure of its business and the imposition of reasonable attorney's fees and costs.

Respectfully submitted this 13th day of May, 2005, at Orlando, Orange County, Florida.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this 13th day of May, 2005, via U.S. Mail to **Usher L. Brown, Esquire**, Brown, Garganese, Weiss, P.A., PO Box 2873, Orlando, FL 32802-2873.

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[9] It is also requesting a permanent injunction.

(2)

No. 06-1122

Supreme Court, U.S.
FILED
MAR 14 2007
OFFICE OF THE CLERK

In The Supreme Court of the United States

SEMINOLE ENTERTAINMENT, INC.,
d/b/a RACHEL'S GENTLEMEN'S CLUB,

Petitioner,

vs.

CITY OF CASSELBERRY, FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The Florida District Court Of Appeal For The Fifth District

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Florida's Fifth District Court of Appeal properly affirmed, per curiam without opinion, the trial court's primary ruling that Rachel's claims are procedurally barred and the trial court's alternative ruling that the licensing regulations in Casselberry's adult entertainment code do not violate the First and Fourteenth Amendments because they further a substantial government interest, and are not aimed at suppressing expressive conduct but rather are aimed at penalizing and terminating unlawful conduct?

PARTIES TO THE PROCEEDING

The parties listed in the caption, Seminole Entertainment, Inc., d/b/a Rachel's Gentlemen's Club, and City of Casselberry, Florida, are the only parties to this proceeding.

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STATEMENT OF JURISDICTION

Seminole Entertainment, Inc., d/b/a Rachel's Gentlemen's Club ("Rachel's") asserts the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The City of Casselberry, Florida ("Casselberry" or "City") respectfully contends that section 1254(1) does not provide a basis for this Court's jurisdiction over this matter because Rachel's does not seek a writ of certiorari directed to one of the federal circuit courts of appeals. Rachel's seeks a writ of certiorari directed to the Florida Fifth District Court of Appeal, and therefore, jurisdiction in this Court, if it exists, would be under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

A. History of the Litigation Between Rachel's and Casselberry

Rachel's was licensed to operate in the City of Casselberry as an adult entertainment establishment, featuring striptease/erotic dancing. This case is one in a series of lawsuits filed by Rachel's against Casselberry, in which Rachel's has challenged the January 31, 2001, suspension of its adult entertainment license and the ordinances upon which said suspension was based.

Contrary to Rachel's assertion, the City never sought to "rid itself" of Rachel's and close it down. The City did, however, wish to "rid itself" of prostitution and other prohibited sexual activity, lewd activity, and drug use and sales. To that end, during a lengthy undercover investigation by the Sheriff's Office of Seminole County, Florida, and the City/County Investigative Bureau, law enforcement agents obtained evidence that the management of

Rachel's was permitting prostitution and other prohibited sexual activity, lewd activity, and drug sales and use to occur on its premises. As a result of this evidence, several arrests were made.

Additionally, Casselberry served Rachel's with a notice of intent to revoke its adult entertainment license, based upon alleged violations of Section 14-92 of the Casselberry City Code. A revocation hearing was subsequently held in accordance with the provisions of Section 14-93 of the Casselberry City Code.[1] Based upon the evidence of illegal and prohibited activity that had been occurring on the Rachel's premises that was established at the revocation hearing, the Casselberry City Commission suspended Rachel's adult entertainment license for a period of two years, effective February 1, 2001.

Importantly, the license suspension did not close Rachel's; it simply suspended Rachel's license to operate as an adult entertainment establishment. The suspension did not in any way affect Rachel's liquor license, and therefore, Rachel's was free to remain open as a liquor lounge. Additionally, Rachel's remained free to operate as a restaurant. Moreover, Rachel's could have scantily clad women, wearing attire such as suggestive cocktail dresses, serve patrons so long as the women's dress (or lack thereof) and conduct was not the type of conduct for which an adult entertainment license was mandated. Rachel's simply could not offer entertainment such as near nude dancing for tips or other direct remuneration, or near nude

[1] Sections 14-92 and 14-93 of the Casselberry City Code are collectively referred to herein as Casselberry's "adult entertainment code."

performances or display of "specified anatomical areas" as defined in the adult entertainment code. In short, Rachel's remained completely free to operate as a "high class," Hooters-style restaurant and lounge.

Rachel's was apparently not content with the broad range of ways in which it could continue to lawfully operate during the suspension of its adult entertainment license, and therefore, began its series of attacks upon the suspension of its adult entertainment license and the ordinance upon which said suspension was based in state circuit court (trial court) and in federal court. In state circuit court, Rachel's filed an action for declaratory judgment and permanent injunction ("injunction action"); that is the case giving rise to the Petition for a Writ of Certiorari that is presently before this Court. The specifics of Rachel's claims in this action will be set forth below. Additionally, one month after filing this lawsuit, Rachel's filed a petition for writ of certiorari in state circuit court, seeking certiorari review of the administrative suspension of its adult entertainment license ("certiorari action").[2] *See Seminole Entertainment, Inc. v. City of Casselberry*, No. 01-23-AP (Fla. 18th Cir. Ct.). In both actions, Rachel's alleged its constitutional rights had been violated.

In this case, Rachel's moved for a temporary injunction enjoining the enforcement of the suspension order. That motion was denied, and Rachel's appealed to the Florida Fifth District Court of Appeal. The Fifth District Court reversed the denial of the motion for temporary

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[2] *See Dusseau v. Metropolitan Dade County Bd. of County Comm'rs*, 794 So. 2d 1270, 1273-74 (Fla. 2001) and *Deerfield Beach v. Valliant*, 419 So. 2d 624-25 (Fla. 1982) for a discussion of certiorari review of administrative decisions in Florida.

injunction with directions to the circuit court to enter the temporary injunction. *See Seminole Entertainment, Inc. v. City of Casselberry*, 811 So. 2d 693 (Fla. 5th DCA 2001) ("*Rachel's I*").

With the temporary injunction in place enjoining the enforcement of the suspension order, the certiorari action was resolved with the circuit court issuing an order denying Rachel's petition for writ of certiorari, thereby concluding that Rachel's had received procedural due process, the essential requirements of law had been observed, and the findings and judgment of the Casselberry City Commission were supported by competent substantial evidence. Rachel's then sought second-tier certiorari review of that decision in the Florida Fifth District Court of Appeal. *See Seminole Entertainment, Inc. v. City of Casselberry*, 813 So. 2d 186 (Fla. 5th DCA 2002) ("*Rachel's II*"). The Florida Fifth District Court denied Rachel's petition for writ of certiorari, finding that procedural due process had been afforded to Rachel's and that the essential requirements of law had been observed. *Id.* In its opinion denying Rachel's relief, the Fifth District Court also ordered that the temporary injunction entered pursuant to the *Rachel's I* decision expired automatically with the issuance of the opinion denying certiorari relief. *See id.* Rachel's efforts to obtain further review in the Florida Supreme Court and in this Court were both unsuccessful. *See Seminole Entertainment, Inc. v. City of Casselberry*, 835 So. 2d 269 (Fla. 2002); *Seminole Entertainment, Inc. v. City of Casselberry, Fla.*, 539 U.S. 915, 123 S. Ct. 2276, 156 L. Ed. 2d 130 (2003).

Thus, contrary to Rachel's attempts in its Petition for a Writ of Certiorari to paint the investigation and subsequent revocation proceedings as improper, biased, and

tainted by a secret love affair, it has been conclusively determined that Rachel's was afforded procedural due process throughout the administrative proceedings. *See Seminole Entertainment, Inc. v. City of Casselberry, Fla.*, 813 So. 2d 186, 189 (Fla. 5th DCA 2002), *review denied*, 835 So. 2d 269 (Fla. 2002), *cert. denied*, 539 U.S. 915, 123 S. Ct. 2276, 156 L. Ed. 2d 130 (2003). Rachel's resurrection of those arguments is improper because those matters were all definitively decided against Rachel's, and are not subject to further consideration.

The circuit court subsequently resolved this injunction action by entering summary judgment in favor of Casselberry, on the basis that res judicata precluded Rachel's from again raising its constitutional challenges. Rachel's appealed that decision to Florida's Fifth District Court of Appeal. *See Seminole Entertainment, Inc. v. City of Casselberry*, 866 So. 2d 1242 (Fla. 5th DCA 2004) (*"Rachel's III"*). The Florida Fifth District Court affirmed in part and reversed in part. *See id.* The relevant details of said opinion and the further activity in this case will be set forth below.

While all of this activity was ongoing in state court, Rachel's and one of its dancers, Pauline Koziara, prosecuted an action for declaratory judgment and injunction in the District Court of the United States for the Middle District of Florida. *See Koziara v. City of Casselberry*, 239 F. Supp. 2d 1245 (M.D. Fla. 2002). In that case, Rachel's and Koziara asserted claims pursuant to 42 U.S.C. § 1983 for alleged violations of their rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution. *See id.* Rachel's efforts in that arena failed, too, with the federal district court granting Casselberry's motion for summary judgment on Rachel's claims on the

basis that said claims are barred by res judicata.[3] *See Koziara*, 239 F. Supp. 2d 1245. The Middle District Court concluded:

> Although Rachel's had the option of litigating all or part of its claims in federal court, state court, or both, Rachel's must have articulated its intentions from the outset. A plaintiff is not guaranteed . . . a right to proceed to judgment in state court on its state claims and then turn to federal court for adjudication of its federal claims. In order to preserve a litigant's right to a federal forum, a litigant should (1) first file in federal court; (2) seek a stay from the federal court to allow the state courts to consider any state law questions; and (3) inform the state court that he or she intends to pursue any federal constitutional claims in federal court following the conclusion of the state court proceedings. Failure to do so, eliminates the opportunity to present such federal claims in a federal forum. Res judicata bars the filing of claims which were raised or could have been raised in an earlier proceeding. Moreover, a plaintiff cannot wait until it receives an unfavorable decision in state court and then adjudicate its claims in federal court. Florida law is clear that the rule against splitting causes of action makes it incumbent upon plaintiffs to raise all available claims involving the same circumstances in one action. Accordingly, the

[3] Koziara lost her case, as well, with the district court subsequently concluding that she did not have standing to raise her claims. *Koziara v. City of Casselberry*, 347 F. Supp. 2d 1223 (M.D. Fla. 2003). Koziara appealed to the Eleventh Circuit Court of Appeals, but was unsuccessful. *Koziara v. City of Casselberry*, 392 F.3d 1302 (11th Cir. 2004).

> doctrine of res judicata bars Rachel's claims and summary judgment is appropriate.

Id. at 1258 (internal citations and quotation marks omitted). Rachel's did not appeal that ruling, and therefore, the federal district court's assessment that Rachel's federal claims are barred by res judicata stands.

B. Details of the Case *Sub Judice*

In the case at bar, Rachel's originally filed suit seeking: (1) a judgment declaring that Sections 14-92 and 14-93 of the Casselberry City Code and Casselberry's suspension of Rachel's adult entertainment license are unconstitutional under "applicable law, including Article I, Sections 2, 4, and 9 of the Florida Constitution"; and (2) a permanent injunction (a) enjoining Casselberry and its agents from enforcing either Casselberry's adult entertainment code or Casselberry's order revoking Rachel's adult entertainment license, and (b) vacating Casselberry's order revoking Rachel's adult entertainment license or directing Casselberry to vacate its order revoking Rachel's adult entertainment license. As stated above, summary judgment was entered in favor of Casselberry, on the basis that Rachel's claims are barred by the doctrine of *res judicata*.

Rachel's appealed from that order. The Florida Fifth District Court of Appeal reversed, finding:

> [A]mong the myriad constitutional complaints Rachel's has asserted in the action below, there are a few that it chose not to assert in *Rachel's II*. Based on our review, this appears to include the claims in paragraphs 29-32 and 40 of the complaint. Accordingly, these constitutional claims are not barred by the prior litigation and to that

> extent, the trial court erred in entering a summary judgment on them.

Rachel's III, 866 So. 2d at 1245.[4] Rachel's and Casselberry both sought certiorari review of said decision in the Florida Supreme Court; both petitions for review were denied.

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[4] The claims in paragraphs 29-32 and 40 of the Complaint, to which the Florida Fifth District Court referred, are as follows:

> 29. The revocation order issued by the City is a content-based order in violation of Article I, Section 4 of the Florida Constitution.
>
> 30. The revocation procedure established by the Casselberry Code of Ordinances violates Seminole Entertainment's rights to due process and equal protection under Article I, Sections 2 and 9 of the Florida Constitution in that there are no criteria established upon which the City Commission is to base its decision or conduct the hearing. There are no established rules of procedure or evidence for the hearing in question. Further, Sections 14-92 and 14-93 violate equal protection, specifically Article I, Section 2 of the Florida Constitution in that there is no lawful basis justifying differentiating between adult entertainment and non-adult entertainment businesses.
>
> 31. The revocation order does not further a substantial government interest and does not constitute the least-restrictive means to achieve the City's goal, and thus same violates Article I, Sections 4 and 9 of the Florida Constitution and Florida law.
>
> 32. The revocation order constitutes a taking without just compensation in violation of Article X, Section 6 and Article I, Section 9 of the Florida Constitution.
>
> . . . .
>
> 40. The definition of "violation" as set forth within Section 14-92 is unconstitutionally vague in violation of Article I, Section 9 of the Florida Constitution. Further, the definition of "violation" denies substantive due process in that it does not require a criminal conviction, court process or adjudication in order for the City to revoke an adult entertainment license.

See Seminole Entertainment, Inc. v. City of Casselberry, 880 So. 2d 1212 (Fla. 2004); *City of Casselberry v. Seminole Entertainment, Inc.*, 880 So. 2d 1210 (Fla. 2004). Hence, the case returned to the trial court.

On remand, Rachel's moved to amend its Complaint. Over Casselberry's objection, Rachel's motion to amend was granted. In its "First Amended Civil Rights Complaint for Declaratory Judgment, Permanent Injunction, Damages, Attorney's Fees and Costs" ("Amended Complaint"), for reasons only Rachel's can comprehend, Rachel's abandoned the claims under state law that had been specifically remanded by the Fifth District Court of Appeal, and instead, asserted that certain provisions of Sections 14-92 and 14-93, as well as the revocation proceedings and order which resulted therefrom, are unconstitutional under the United States Constitution. Specifically, Rachel's alleged violations of its First, Fifth, and Fourteenth Amendment rights under the United States Constitution. Additionally, Rachel's asked the circuit court to issue a judgment declaring that Sections 14-92, 14-93, and 14-66 of the Casselberry Adult Entertainment Code are unconstitutional under the United States Constitution, and that the suspension of Rachel's license was unconstitutional under the First, Fifth, and Fourteenth Amendments. Further, Rachel's asked the circuit court to issue a permanent injunction enjoining the enforcement of Sections 14-92, 14-93, and 14-66 of Casselberry's Adult Entertainment Code. Lastly, Rachel's sought an award of attorney's fees and costs pursuant to 42 U.S.C. §§ 1983 and 1988. Interestingly, Rachel's was attempting to use the state court to litigate federal claims, after the Florida Middle District Court had previously told Rachel's it was procedurally barred from bringing an action in federal court regarding

this matter. *See Koziara v. City of Casselberry*, 239 F. Supp. 2d 1245 (M.D. 2002).

Rachel's and Casselberry filed cross-motions for summary judgment. Following a hearing, the trial court entered final summary judgment in favor of Casselberry. The trial court ruled that Rachel's claims are procedurally barred, and *alternatively*, rejected Rachel's constitutional challenges in their entirety. Specifically, the trial court stated:

> In the event that the summary judgment awarded on procedural grounds is found to be erroneous, to preserve judicial resources, this Court will also consider the separate motions on their merits. The below analysis is an independent and alternative ruling which would be made if the appellate court was inclined to reverse and remand this summary judgment.

See Petition Appendix B, p. 5a. Rachel's appealed to Florida's Fifth District Court of Appeal. The Fifth District Court of Appeal affirmed, per curiam, without issuing a written opinion. *See Seminole Entertainment, Inc. v. City of Casselberry*, 942 So. 2d 898 (Fla. 5th DCA 2006). The Fifth District Court's per curiam decision without written opinion barred Rachel's from seeking review in the Florida Supreme Court. *See Stallworth v. Moore*, 827 So. 2d 974, 978 (Fla. 2002) (Florida Supreme Court "does not have discretionary review jurisdiction or extraordinary writ jurisdiction to review per curiam denials of relief, issued without opinion or explanation, whether they be in opinion form or by way of unpublished order."); Fla. R. App. P. 9.030(a). Rachel's now requests that this Court accept jurisdiction over this matter.

ARGUMENTS FOR DENYING THE PETITION

Undaunted by six years of unsuccessful litigation in state and federal trial and appellate courts over the suspension of its adult entertainment license and the ordinances upon which said suspension was based, Rachel's now asks this Court to accept certiorari jurisdiction over this matter to review a per curiam affirmed decision of the Florida Fifth District Court of Appeal. In doing so, Rachel's completely disregards the undisputable fact that the Fifth District Court's decision affirmed an order of the trial court that was based on procedural grounds rather than the determination of a federal question.

Rachel's ignores the procedural roadblock with which it is faced and argues that as a matter of due process and First Amendment jurisprudence, a property right, such as a license, cannot be suspended based upon a theory of strict liability or respondeat superior. Rachel's contends that an owner's knowledge of wrongful activity or culpable conduct must be established. Rachel's simply has not established a basis upon which this Court can, or should, exercise jurisdiction over this matter, and therefore, its Petition for a Writ of Certiorari should be denied.

I. This Case Does Not Present a Federal Question for This Court's Review.

It is indisputable that this Court's "principal responsibility under current practice" and a "primary basis for the Constitution's allowing [the Court] to review state court decisions, . . . is to ensure the integrity and uniformity of federal law." *Kansas v. Marsh*, ___ U.S. ___, 126 S. Ct. 2516, 2530, 165 L. Ed. 2d 429 (2006) (Scalia, J., concurring) (citations omitted). This Court must "resolve

conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. U.S.*, 500 U.S. 344, 348, 111 S. Ct. 1854, 1857, 114 L. Ed. 2d 385 (1991).

The decision that Rachel's asks this Court to review is a per curiam affirmed decision, which does not provide any discussion or citation to case law. The decision does not provide any basis whatsoever upon which one could definitely conclude whether the Fifth District Court found, as the trial court had, that Rachel's federal claims are procedurally barred, or whether the court considered Rachel's federal claims and rejected them. Rachel's asserts:

> Here, one would think that the Florida intermediate appellate court ruled against Rachel's on the merits of its case finding the code constitutional. Had this not been the case, the court would have explained at least in a cursory fashion how the case was procedurally barred (if that were the court's intent).

(Petition, p. 14). Furthermore, Rachel's uses discussion that occurred at oral argument before the Fifth District Court to support its assertion that the Fifth District Court considered and rejected Rachel's federal claims. *See* Petition, pp. 8-9.

Under Florida law, the principle guiding the appellate courts is that they do not reach constitutional questions unless they are required to do so in order to decide a lawsuit. *See, e.g., The Florida Bar v. Gold,* 937 So. 2d 652, 655 (Fla. 2006) ("When a case may be resolved on grounds other than constitutional grounds, the Court will ordinarily refrain from proceeding to decide the constitutional

question."); *Singletary v. State,* 322 So. 2d 551, 552 (Fla. 1975) ("[W]e adhere to the settled principle of constitutional law that courts should not pass upon the constitutionality of statutes if the case in which the question arises may be effectively disposed of on other grounds."); *Gaudet v. Florida Bd. of Prof. Engineers*, 900 So. 2d 574, 581 (Fla. 4th DCA 2004) (a court will not decide constitutional questions if an issue can be determined on any other grounds).

In this case, the trial court very clearly articulated that Rachel's claims were procedurally barred. The trial court only addressed the merits of Rachel's claims "as an independent and alternative ruling which would be made if the appellate court was inclined to reverse and remand the summary judgment." (Petition Appendix B, p. 5a). Accordingly, contrary to Rachel's assertion, there is a presumption that the Fifth District Court did not reach the federal question in order to decide this case because it could effectively dispose of the case on procedural grounds. *See Gold,* 937 So. 2d at 655; *Singletary,* 322 So. 2d at 552; *Gaudet*, 900 So. 2d at 581.

Without a basis upon which to conclude that the Fifth District Court decided any federal question, and that its decision of that federal question conflicts with the decision of another state court of last resort or of a United States court of appeals, this Court should conclude that it has no jurisdiction over this matter. *See id.; Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527, *reh'g denied,* 463 U.S. 1237, 104 S. Ct. 33, 77 L. Ed. 2d 1453 (1983) (If both requirements that a federal question has been raised *and decided* in the state court below do not appear on the record, the appellate jurisdiction of the Supreme Court fails.); *New York Times Co. v. Jascalevich*, 439 U.S. 1317,

1318, 99 S. Ct. 6, 8, 58 L. Ed. 2d 25 (1978) ("[I]t is only final judgments with respect to issues of federal law that provide the basis for our appellate jurisdiction with respect to state-court cases."); Sup. Ct. R. 10 (Supreme Court may exercise jurisdiction over cases where "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.").

II. Remand to the Fifth District Court of Appeal for Clarification of Its Decision Would Be Improper.

Rachel's asserts "[i]f there is any question about whether the lower court reached the 'federal' merits, then this case should be remanded to the appellate court to explain its reasoning affirming the final judgment herein." Petition, p. 14. This request is a disguised attempt to obtain what in effect would be a writ of mandamus compelling the Fifth District Court of Appeal to issue a written opinion in this case. In Florida, there is no right to have an appellate court issue a written opinion explaining the basis for its decision on an appeal. *See Whipple v. State*, 431 So. 2d 1011 (Fla. 2d DCA 1983). The Fifth District Court of Appeal has exercised its right to decline to issue a written opinion and that decision should be left undisturbed.

One of the cases cited by Rachel's in support of its request that this Court remand this matter to the Fifth District Court for the court to explain the reason behind its affirmance of the final judgment herein actually provides support for the conclusion that a remand in this case would be wholly inappropriate. As this Court explained in

Michigan v. Long, 463 U.S. 1032, 1040-41, 103 S. Ct. 3469, 3476-77, 77 L. Ed. 2d 1201 (1983):

> Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. It is precisely because of this respect for state courts, and this desire to avoid advisory opinions, that we do not wish to continue to decide issues of state law that go beyond the opinion that we review, or to require state courts to reconsider cases to clarify the grounds of their decisions.

Id. The Court noted, however, in the footnote cited by Rachel's, that "[t]here may be certain circumstances in which clarification is necessary or desirable, and we will not be foreclosed from taking the appropriate action." *Long*, 463 U.S. at 1040-41, 103 S. Ct. at 3476-77.

As discussed above, the trial court decided this case on procedural grounds. The Fifth District Court of Appeal affirmed that decision. Regardless of any discussion that occurred at oral argument, it is presumed that the Fifth District Court did not reach the federal question in order to decide this case because it could effectively dispose of the case on procedural grounds. *See Gold,* 937 So. 2d at 655; *Singletary,* 322 So. 2d at 552; *Gaudet*, 900 So. 2d at 581. Accordingly, it is not necessary or desirable for this Court to remand this matter to the Fifth District Court of Appeal for clarification of its decision.

III. Casselberry's Adult Entertainment Code Is Not an Impermissible Strict Liability Code.

Instead of explaining why this case is one which this Court should accept for certiorari review, Rachel's "Reason for Granting the Writ" focuses on the merits of Rachel's argument on appeal and contends that Casselberry's adult entertainment code constitutes a "strict liability" code which authorizes the suspension of a license based upon a theory of strict liability or respondeat superior.

Rachel's ignores the fact that in Florida, a licensee can be inferred to have knowledge of illegal activities occurring at his or her business if the facts establish that the violations of law were "fostered, condoned or negligently overlooked" by said licensee, notwithstanding the licensee's absence from the business premises on the dates on which the illegal activities occurred. *See, e.g., Pic N' Save Central Florida, Inc. v. Dept. of Business Reg., Div. of Alcoholic Beverages and Tobacco*, 601 So. 2d 245 (Fla. 1st DCA 1992); *Pauline v. Lee*, 147 So. 2d 359 (Fla. 2d DCA 1962). *See also Golden Dolphin No. 2, Inc. v. State*, 403 So. 2d 1372 (Fla. 5th DCA 1981) (customer's testimony that he had witnessed licensee's employees committing certain violations on several occasions prior to occasion on which license suspension was based was sufficient to support finding that licensee had knowledge of the violative activity); *G & B of Jacksonville, Inc. v. State*, 371 So. 2d 139 (Fla. 1st DCA 1979) (persistent and practiced manner in which violations were executed supported conclusion that licensee either condoned or negligently overlooked the illegal activities); *Lash, Inc. v. State, Dep't of Bus. Reg.*, 411 So. 2d 276 (Fla. 3d DCA 1982) (license revocation upheld where evidence established that on five occasions

over period of one week, undercover beverage agents purchased controlled substances from two of licensee's employees). Thus, in Florida, a license may be revoked lawfully when there is evidence presented that violations of the law were either fostered, condoned, or negligently overlooked by the licensee.

Additionally, under federal law, a license may be suspended as a consequence for r.io bad acts. *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 707 (1986).

Casselberry's adult entertainment code complies with these and other relevant authorities. Casselberry reserves its right to further explain in its responsive brief that will be filed if this Court grants Rachel's Petition for a Writ of Certiorari and schedules this matter for briefing and oral argument, why Rachel's argument should be rejected and why this Court should uphold Casselberry's adult entertainment code.

CONCLUSION

For the foregoing reasons, the City of Casselberry respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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(3) Mar. 26, 2007

No. 06-1122

In The

Supreme Court of the United States

SEMINOLE ENTERTAINMENT, INC.,
d/b/a, RACHEL'S GENTLEMEN'S CLUB,

Petitioner,

vs.

CITY OF CASSELBERRY, FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The Florida Fifth District Court Of Appeal

PETITIONER'S REPLY BRIEF

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CORRECTION TO FACTS

The city states that the authorities obtained evidence that Rachel's management was permitting prostitution, etcetera (City's brief at pages 1-2). In contrast, the appellate court found that arguably Rachel's key management personnel had no knowledge of this activity. See *Seminole Entertainment, Inc. v. City of Casselberry*, 811 So.2d 693, 695 (Fla. 5th DCA 2001).

Further along in its brief the city states that the federal district court found that Rachel's federal claims (raised here) were barred by *res judicata*.

> [t]he federal district court's assessment that Rachel's federal claims are barred by res judicata stands.

(City's brief at page 7).

> Interestingly, Rachel's was attempting to use the state court to litigate federal claims, after the Florida Middle District Court had previously told Rachel's it was procedurally barred from bringing an action *in federal court* regarding this matter.

(City's brief at pages 9-10) (Emphasis added).

Had the city left out the words "in federal court" the statement would be false. Instead, by including those three words, the city's statement is misleading. The federal court found that Rachel's was required to raise its federal claims *in state court* because Rachel's other action was pending there.

> In the state court proceedings, the circuit court had jurisdiction to consider **any attack** by Rachel's,

> constitutional or otherwise, to the revocation hearing or the revocation order in the certiorari petition, as well as any as-applied attack on the ordinance. (Note omitted). However, any facial attack on the constitutionality of the ordinance should have been brought in the declaratory judgment action. Also, a claim under 42 U.S.C. §1983 may be brought in state court. (Citations omitted). Accordingly, the circuit court[1] had jurisdiction to decide both actions brought by Rachel's, **as well as the claims asserted in this suit.** (Citation omitted).

Koziara v. City of Casselberry, 347 F.Supp. 2d 1223, 1257 (M.D. Fla. 2003).

After the state appellate court reversed the entry of [the first] summary judgment against Rachel's as reported in *Seminole Entertainment, Inc. v. City of Casselberry*, 866 So.2d 1242 (Fla. 5th DCA 2004), Rachel's moved to amend its lawsuit raising the instant federal claims (as alluded to and referenced in the federal decision). Rachel's motion to amend was granted, and Casselberry did not appeal that order.

In its [second] order of summary judgment the state trial judge also rejected Casselberry's *res judicata* argument based on the federal decision.

> The federal action, dismissed on the basis of *res judicata*, has little bearing on this case. As pointed out in the defendant's motion, the first prong of the test for *res judicata* is that there must be a final judgment on the merits (citation omitted). **The federal decision was not made**

[1] Referring to the state court.

> **on its merits**; the 42 U.S.C. §1983 claim was denied on procedural grounds. Therefore, this state claim cannot be dismissed on the basis of *res judicata*, as there has never been a determination of this particular claim on its merits.

Appendix B to Rachel's Petition at page 4a (Emphasis added).

Accordingly, the city's inference that the federal court determined Rachel's claims were barred as a matter of *res judicata* is nothing more than a red herring.

THE COURT IS NOT FORECLOSED FROM ACCEPTING REVIEW FROM A "PCA" – *MICHIGAN v. LONG*

The city makes two interesting statements at page twelve. First, Casselberry notes that Rachel's is asking this court to review a per curium affirmance (PCA), which does not provide any discussion or citation of authority. In Florida, a PCA forecloses further appellate review with the Florida Supreme Court. See generally, Art. V, Section 3(b), Fla. Const. However, this court's jurisdiction is not effected by same. For instance, see *Corona v. Florida*, 541 U.S. 930 (2004), where this court granted Corona's petition vacating a PCA issued by the Florida Fifth District Court of Appeal – the same court that issued the PCA in this case.

Second, the city states that it is impossible to determine if the Fifth District ruled upon Rachel's case on the merits of the United States constitutional claims or as a matter of state procedural law (City's brief at page 12). This is important because under these circumstances and pursuant to *Michigan v. Long*, 463 U.S. 1032, 1041-1042

(1983), this court should presume that the matter was decided under federal law.

At a minimum, this court should consider a remand to the state appellate court for an explanation as to how this politically-charged and tumultuous case was decided. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) [important that ambiguous adjudications by state courts do no stand as barriers to determination of federal question]; *Capital Cities Media, Inc. v. Toole*, 466 U.S. 378 (1984) [court may remand case to state court for clarification as to basis for lower court decision].

THERE IS NO DISPUTE - THE CITY'S CODE IS STRICT LIABILITY

On many occasions this court has accepted review over cases deemed important enough to merit attention. This is such a case. The city's code provides that an adult entertainment license can be suspended based upon employee misconduct – conduct that is automatically imputed to ownership. Rather than defending its code before this court, the city is silent on the subject. Yet it conceded this point before the state appellate court.

> Therefore, under Section 14-70 of Casselberry's City Code, **the owner is imputed** to have knowledge of the criminal activity if the manager or doorman whom the owner leaves in control of the business has knowledge of the criminal activity.

City's Answer Brief filed with the Fifth District Court of Appeal at p. 46.

* * *

> Thus, under the Casselberry code, **any individual who qualifies as a "licensee," which is defined to include owners, operators, and workers**, who knowingly permits sale of controlled substances, prostitution, or other specified prohibited sex acts to occur on the premises, **exposes the establishment to license revocation proceedings.**

City's Answer Brief filed with the Fifth District Court of Appeal at p. 39.

The only argument the city advances is that (as a matter of due process) Florida law provides that a license cannot be suspended unless it is established that the owner had knowledge of wrongdoing or was culpably responsible for same due to a lack of due diligence. See *Pic N' Sav v. Department of Business Regulation*, 601 So.2d 245, 250 (Fla. 1st DCA 1992). See also, *In the Matter of the Revocation of County Beverage License,* 1980 OK 183 (OK 1980).

The problem is that Casselberry's code does not address the culpable conduct of an owner; rather, it holds ownership automatically responsible for bad acts committed by any worker at the establishment (regardless of the worker's position, e.g., janitor, disc jockey, waitress, entertainer, et cetera). In other words, an extremely valuable property right can be taken simply because a worker violates the law – regardless of the steps an owner takes to train his workers and monitor the premises.

Rachel's respectfully requests that the court accept review over this important case.

Respectfully submitted this 26th day of March, 2007.

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